

RESOLUTION NUMBER 2022 - 185

WHEREAS, Hernando County has adopted zoning regulations pursuant to Chapter 163 and Section 125.01(1), *Fla. Stat.*, which authorize the County to regulate the use of land in the unincorporated areas of Hernando County, Florida, and take action on the request herein; and,

WHEREAS, the Hernando County Board of County Commissioners (BOCC) conducted a duly advertised public hearing on August 9, 2022, to consider the requested changes in zoning on the specified parcel(s) in Hernando County, Florida, as more fully described below.

NOW THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF HERNANDO COUNTY, FLORIDA AS FOLLOWS:

APPLICANT: Shutts & Bowen, LLP on behalf of Temple Beth David Jewish Center, Inc.

FILE NUMBER: H-22-10

GENERAL LOCATION: East of Linden Road, south of Antelope Street, and north of Feather Street

LEGAL DESCRIPTION: A 60' by 60' foot portion of the following described parcel:

Tract "D" of SPRING HILL UNIT 13, according to the plat thereof, as recorded in Plat Book 8, Pages 84 through 100, inclusive of the Public Records of Hernando County, Florida,

LESS AND EXCEPT;

That part of said Tract "D" of SPRING HILL UNIT 13, conveyed from THE DELTONA CORPORATION TO HERNANDO COUNTY, FLORIDA by Special Warranty Deed dated February 4, 1975 and recorded July 21, 1975 in the Official Records Book 365, Pages 667 through 669, inclusive of the Public Records of Hernando County, Florida, being more particularly described as follows:

Commence at the intersection of the Easterly boundary line of said Tract "D" and Northerly right-of-way line of Feather Street as shown on the said plat of SPRING HILL UNIT 13; run thence S61°30'00"W along said Northern right-of-way line of Feather Street for a distance of 249.02 feet to the POINT OF BEGINNING of the parcel of land hereinafter described; thence continue S61°30'00"W along said Northerly right-of-way line for a distance of 135.00 feet to the point of curvature of a circular curve to the right having a radius of 25.00 feet; thence run Northwesterly along the arc

of said curve through a central angle of 90°00'00" for a distance of 39.27 feet to the point of tangency of said curve, said point being on the Easterly right-of-way line of East Linden Drive for a distance of 195.00 feet; thence leaving said Easterly right-of-way line, run N61°30'00"E for a distance of 160.00 feet; thence run S28°30'00"E for a distance of 220.00 feet to the Point of Beginning.

Containing 5.10 acres more or less (the "Parcel").

REQUEST:

The Applicant is requesting a Public Service Facility Overlay District ("PSF") for a Communication Tower in order to construct a 160' monopole communication tower, antennae array, and associated operational equipment. The Applicant has indicated they will be relocating antennae from a constrained unipole facility. The proposed compound will be a 60' x 60' portion of an existing 5.1-acre PDP(SU)/Planned Development Project (Special Use) for a church and part of the original Spring Hill Master Plan.

The representations contained in the Applicant's evidentiary submission as well as all other documentary evidence entered into the public hearing record are incorporated herein by reference and made a part hereof and are relied upon by the County to be true and correct. For purposes herein, it is presumed that all requisite notice and advertising requirements have been satisfied.

FINDINGS OF FACT:

ALL of the facts and conditions set forth in the County's staff memoranda and presented to the BOCC in connection with the public hearing in this matter are incorporated herein by reference and made a material part of this Resolution as integral to the BOCC's action. The BOCC finds that the testimony and record supporting the denial of the request to be credible and to constitute competent substantial evidence. In further support thereof, the BOCC makes the following specific findings of fact:

1. PSF districts are presently allowed in all zoning districts subject to a rezoning hearing and otherwise meeting all the requirements contained in the County's adopted Comprehensive Plan and its land development regulations.
2. The current zoning of the Parcel is a Planned Development Project (Special Use) ("PDP(SU)") for use as a church. Across the street to the northwest of the Parcel is property zoned commercial and to the northeast is property zoned single-family residential. The property adjacent to the Parcel on the South, East, and West sides are all zoned single-family residential.

3. The Parcel is located in and surrounded by the Residential Future Land Use Map Designation as part of the Comprehensive Plan.
4. The BOCC finds that the Applicant did not adequately demonstrate that it was not reasonably possible to provide wireless service to the subject residential area without locating a communication tower in said residential area. The Applicant searched and found no suitable property for sale to accommodate their communication tower, but the search did not include preexisting towers. There is a communication tower less than 300 yards away from the site for this request where the Applicant's anchor tenant used to be located. There was competent, substantial evidence that the nearby communication tower could accommodate the Applicant's needs in this request. Further, there was testimony that the nearby communication tower was available for placement of the Applicant's antennae.
5. The Applicant also failed to adequately demonstrate that the requested use is compatible and not adverse to the existing surrounding uses. The proposed communication tower, even if camouflaged to look like a palm tree, would be more than 400% higher than the maximum height allowed in a residential zoning district and does not match the height of the existing trees in the area. Multiple sample pictures were displayed that showed how a 160' high communication tower on the Parcel would be visible above the tree line. The Applicant's request poses more than a minimal visual impact to the adjacent residential area.
6. Multiple citizens testified that they personally would not buy a home located in close proximity to a communication tower. At least one citizen testified that she chose not to buy a home because of its proximity to a communication tower. Another citizen testified that she contacted her realtor to sell her home near the Parcel, and learned about her realtor's experience with other home buyers choosing not to buy homes because a communication tower was visible from the home. Another citizen testified that he told his realtor he did not want the realtor to show him homes from which one could see a communication tower. The Applicant's request will have a negative material impact on the surrounding residential area.
7. The proposed request is not consistent with the County's adopted Comprehensive Plan and land development regulations. Moreover, the proposed request is not compatible with the surrounding land uses.

**CONCLUSIONS
OF LAW:**

The BOCC is authorized to act on this matter pursuant to Chapters 125 and 163, *Fla. Stat.* Accordingly, after public hearing and testimony, being fully advised in the record, and based upon competent substantial evidence, the BOCC makes the following specific conclusions of law:

1. Local government is preempted from regulating certain aspects of communication towers. 47 U.S.C. § 332. “No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission’s regulations concerning such emissions.” *Id.* § 332(c)(3)(A). Moreover, “[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services.” *Id.* § 332(c)(7)(B). However, “[e]xcept as provided in this paragraph, nothing in this chapter shall limit or affect the authority of the State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.” *Id.* § 332(c)(7)(A).
2. Hernando County regulates communication towers¹ pursuant to Appendix A, Article II, Section 2F and Appendix A, Article IV, Section 11B(6) of the Code.
3. In the Code, “[t]he purpose of the regulations for communication towers is to provide general guidelines for the location of these types of facilities, with the goal of encouraging the location of towers in appropriate areas, encouraging the joint use of and collocation of new and existing facilities, encourage the use of camouflage techniques where appropriate, and encourage the users of towers and antennae to locate and configure in a way that minimizes the visual impacts. The requirements shall not have the effect of prohibiting the provision of telecommunications service, shall not have the effect of discriminating among providers, and shall not regulate the placement of facilities based upon the environmental effects of radio frequency emissions if they comply with FCC rules on radio emissions. All communication towers shall comply with the requirements of the Federal Aviation Administration (FAA), the Federal Communications Commission (FCC) and shall be subject to the following regulations, except where otherwise provided for in the Zoning Ordinance.” *Id.* Art. II, § 2F.
4. In relation to communication towers, the Code provides for color and camouflage techniques, illumination, fencing, signage, structural design,

¹ A “communication tower” is defined as a “structure, used for the purpose of elevating an antenna, placed on a foundation or existing structure and constructed to a given height for radio, television, microwave, cellular, personal communication services or radar or any similar communication purpose. For the purposes of this ordinance, communication towers utilized for noncommercial uses shall be excluded. App. A, Art. I, § 3(30), Code.

collocation, setbacks, proximity to residential areas, abandonment, performance bonding, and a required legal description. *Id.* §§ 2F(1)-(15).

5. When it comes to the proximity of communication towers to residential areas, “[i]t is the desire of the governing body that communication towers are not located within residential areas² or residential zoning districts³ wherever feasible; and instead encourage that communication towers are located within commercial, industrial and non-residential zoning districts provided that all other requirements of this zoning code can be met. In the event that it is not reasonably possible to provide wireless service to a particular residential area or residential zoning district without locating a communication tower in said area or district, then it shall be the applicant's burden to affirmatively demonstrate⁴ that said residential area or district cannot be adequately served from outside said area or district and that alternate locations (including all non-residential locations capable of servicing the targeted wireless service area) are not available.⁵” *Id.* § 2F(9).
6. Appendix A, Article IV, Section 11B(6) of the Code provides criteria that must be met to rezone property to a PSF for a communication tower site.
7. Section 11B(6)(b) of the Code provides information that must be included in the application, which ensures that a PSF for a communication tower is not unnecessarily placed in a residential area. As part of the application, the applicant has the burden to show “how the proposed location permits provisions of service that cannot reasonably be provided from outside the residential area,” to provide “an inventory and a map showing all existing structures and towers within the search ring that are available for collocation,” to show “that coverage can not be provided from an existing structure or tower site,” “[p]rovide evidence that the applicant has pursued collocation, use of approved sites, and use of existing structures of an

² “‘Residential area’ for purposes of this subsection means any location which is predominated by residential dwelling units (*e.g.*, single family homes, manufactured or mobile homes, town homes, condominiums and/or apartments) and which shares the characteristics of a common neighborhood.” App. A, Art. II, § 2F(9), Code.

³ “‘Residential district,’ for purposes of this subsection, shall have the same meaning as provided under Article IV of this zoning code.” *Id.*

⁴ “‘Adequately demonstrate’ for purposes of this subsection means that the applicant has provided such data and analysis which identifies the area or district sought to be served by wireless service, which identifies the non-residential properties within that area or district (if any), and which describes all efforts and due diligence undertaken by the applicant to secure a location within a non-residential area or district. *Id.*

⁵ “‘Not available’ for purposes of this subsection means that a given property is either fully developed, not available for sale or lease at fair market value, outside of the range necessary to serve the targeted wireless area, or precluded from having a communication tower located thereon based on some other provision of this zoning code.” *Id.*

appropriate height,” and different options for camouflage and diminishing the visual effect of the tower.

8. For communication towers in residential areas, “the applicant must demonstrate to the satisfaction of the County that service cannot be provided from outside the residential area and that no alternative locations are available.” *Id.* § 11B(6)(c).
9. Additionally, a rezoning to PSF for a communication tower must be compatible with the surrounding land uses. *Id.* § 11B(6)(d). A rezoning to PSF for a communication tower shall not have a negative material impact on surrounding land uses, shall not have a negative material impact on infrastructure, shall not have negative material environmental impacts as allowed to be reviewed by applicable laws, and shall have minimal visual and functional conflict between the proposed use and nearby neighborhood uses. *Id.*
10. Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record. 47 U.S.C. § 332(c)(7)(B)(iii). A locality “can delay the issuance of its denial within [a] 90- or 150-day window, and instead release it along with its reasons once those reasons are ready to be provided. Only once the denial is issued would the 30-day commencement-of-suit clock begin.” *T-Mobile S., LLC v. City of Roswell, Ga.*, 574 U.S. 293, 304-05 (2015).
11. Under the Federal Telecommunications Act of 1996 (the “Act”), the substantial evidence standard to review a local government’s decision related to a communications tower should include consideration of the requirements of the local zoning ordinance. *PI Telecom Infrastructure, LLC v. City of Jacksonville, Fla.*, 104 F. Supp. 3d 1321, 1342 (M.D. Fla. 2015). “Thus, ‘[w]hen evaluating the evidence [supporting the denial], local and state zoning laws govern the weight to be given the evidence,’ and the Act does not ‘affect or encroach upon the substantive standards to be applied under established principles of state and local law.’” *Id.* (citing *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir. 1999)).
12. “The substantial evidence standard envisioned by Section 332 is the traditional substantial evidence standard used by courts to review agency decisions,” which defines substantial evidence as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *American Tower LP v. City of Huntsville*, 295 F.3d 1203, 1207 (11th Cir. 2002) (internal citations omitted). “It requires more than a mere scintilla

but less than a preponderance.” *Id.* (internal citations omitted). In a rezoning for a communication tower, a local government is authorized to consider “the proposed tower’s negative aesthetic impact (as well as its effect on property values) and the proposed tower’s effect on the health, safety, and welfare of the public.” *Id.* at 1208.

13. “Aesthetic objections coupled with evidence of adverse impact on property values or safety concerns can constitute substantial evidence . . . Also relevant is whether the company can reasonably place a cell site in an alternative location and eliminate the residents’ concerns.” *Michael Linet, Inc. v. Village of Wellington, Fla.*, 408 F.3d 757, 761-62 (11th Cir. 2005) (internal citations omitted); *but see Municipal Comms., LLC v. Cobb Cnty., Ga.*, 796 Fed.Appx. 663, 669-70 (11th Cir. 2020) (holding that an alternative tower site was unavailable because the owner of the land refused to lease the site to the tower company).

**DISPOSITIVE
ISSUE:**

Notwithstanding the wide range of arguments and evidence that the parties presented to the BOCC, this appeal actually turns on the answer to a single question: Did the Applicant meet its burden to comply with all the requirements of the Code to place a communications tower in a residential area?

In sum, the Applicant did not meet its burden to “adequately demonstrate” that it was not reasonably possible to provide wireless service to the subject residential area without locating a communication tower in said residential area. Further, the Applicant’s request is not compatible with the surrounding land uses and is not consistent with the Comprehensive Plan.

First, multiple parties testified that a communication tower that could accommodate the Applicant’s equipment was located less than 300 yards away from the Applicant’s selected site. The Applicant searched and found no suitable nonresidential properties for sale in its search ring to place a communication tower on, but the Applicant’s expert testified that he did not look for preexisting communication towers where antennae could be collocated. As a result, the Applicant did not meet its burden in the Code to show that “no alternative locations are available.” App. A, Art. IV, §§ 11B(6)(b)-(c), Code.

Second, the Applicant’s communication tower is not compatible with the surrounding residential area because it poses more than a “minimal visual and functional conflict between the proposed use and nearby neighborhood uses.” *Id.* § 11B(6)(d)(4). The proposed camouflaging of the

communication tower would be higher than any of the trees in the area and the tower itself would not look aesthetically similar to those trees.

Third, the Applicant's communication tower is not compatible with the surrounding residential area because it will "have a negative material impact on surrounding land uses." *Id.* § 11B(6)(d)(1). While there was conflicting testimony about the impact of a communication tower on home values, there was testimony regarding potential home buyers choosing not to buy a home because it was located near a communication tower.

In conclusion, the rezoning to PSF for a communications tower is not a like use in the residential area and is not compatible with the residential area.

ACTION: After notice and public hearing, based upon the record in this matter and **ALL** of the findings of fact and conclusions of law above, the BOCC hereby **DENIES** the requested rezoning to allow the proposed Public Service Facility Overlay District for a Communication Tower.

ADOPTED IN REGULAR SESSION THE 11th DAY OF October 2022.

**BOARD OF COUNTY COMMISSIONERS
HERNANDO COUNTY, FLORIDA**

Attest: Heidi Kuyper, D.C.
fa DOUG CHORVAT, JR.
CLERK

By: [Signature]
Steve Champion
CHAIRMAN



APPROVED AS TO FORM
AND LEGAL SUFFICIENCY
BY [Signature]
County Attorney's Office